

**Dissenting Views**  
**H.J. Res. 4, The “Flag Protection Amendment”**

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H.J. Res. 4, the “Flag Protection Amendment,” proposing an amendment to the U.S. Constitution authorizing Congress to enact legislation prohibiting physical desecration of the flag of the United States, would mark the first time in our nation’s history that the Constitution had ever been amended in order to curtail an existing right. In this instance, the proposed amendment would narrow the scope of the First Amendment’s protection of free expression. This dangerous and unnecessary assault on our fundamental liberties would set a terrible precedent. For the reasons set out below, we respectfully dissent.

As a general matter, Congress has treated the Constitutional amendment process as a remedy of last resort. Although numerous amendments to the Constitution have been proposed, it has been a power used rarely and with great care. Over more than 200 years, our Constitution has been amended only 27 times. If ratified, H.J. Res. 4 would, for the first time in our Nation's history, modify the Bill of Rights to limit freedom of expression.

This Constitutional amendment is a response to a pair of Supreme Court decisions, *Texas v. Johnson*, 491 U.S. 397 (1989) and *United States v. Eichman*, 496 U.S. 310 (1990), in which the Court held that state and federal government efforts to prohibit physical “desecration” of the flag by statute were content-based political speech restrictions and imposed unconstitutional limitations on that speech.<sup>1</sup>

**I. Background:**

The first flag desecration statutes originated in the States in the late 19<sup>th</sup> century after supporters failed to obtain federal legislation prohibiting commercial or political “misuse” of the flag. During the period between 1897 and 1932, flag desecration statutes were enacted in every state. These statutes outlawed use of the flag for a number of purposes, including commercial advertising, marking the flag for political, commercial or other purposes, or publicly mutilating, trampling, defacing or defiling or casting contempt, by words or action, upon the flag.<sup>2</sup>

Congress remained relatively silent on the issue throughout that period, approving the first federal flag desecration law in 1968<sup>3</sup> in the aftermath of a highly publicized Central Park flag

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<sup>1</sup> The proposed amendment reads, in its relevant part, “The Congress shall have power to prohibit the physical desecration of the flag of the United States.” H.J. Res. 4 108<sup>th</sup> Cong.(2001).

<sup>2</sup> Most of these statutes were eventually struck down as unconstitutional in a series of lower court decisions, usually on the grounds of vagueness.

<sup>3</sup> 18 U.S.C. 700.

burning incident in protest against the Vietnam War. The 1968 federal law made it illegal to “knowingly” cast “contempt” upon “any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it.” The law imposed a penalty of up to \$1,000 in fines and/or one year in prison.

Shortly after passage of the 1968 law, the Supreme Court considered three notable cases concerning the flag; however, none of these decisions directly addressed the flag burning issue. In *Street v. New York*,<sup>4</sup> the Court ruled that New York could not convict a person for making verbal remarks disparaging the flag. In 1972, the Court ruled in *Smith v. Goguen*,<sup>5</sup> that Massachusetts could not prosecute a person for wearing a small cloth replica of the flag on the seat of his pants based on a state law making it a crime to publicly treat the U.S. flag with “contempt.” The Court ruled that the law was unconstitutionally vague. In *Spence v. Washington*,<sup>6</sup> the Court overturned a Washington state “improper use” flag law, which, among other things, barred placing any marks or designs upon the flag or displaying such altered flags in public view. These decisions intimated but did not expressly hold that flag burning for political purposes constituted protected activity under the First Amendment.

In 1989, the Supreme Court finally addressed whether a flag burning statute violates the First Amendment in *Texas v. Johnson*.<sup>7</sup> The Court determined that the First Amendment protects those citizens who burn the U.S. flag in political protest from prosecution. In that case, Gregory Johnson was arrested for burning the U.S. flag in violation of Texas’ “Venerated Objects” law<sup>8</sup> during a demonstration outside of the Republican National Convention in Dallas. The Texas statute outlawed “intentionally or knowingly” desecrating a “national flag.” According to the statute, the term “desecrate” was defined to mean “to deface, damage or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.”<sup>9</sup> The Court of Appeals for the Fifth District of Texas upheld Johnson’s conviction.<sup>10</sup> Texas’ highest criminal court, the Court of Criminal Appeals, reversed the lower court decision, holding that the Texas law had been unconstitutionally applied to Johnson in

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<sup>4</sup> 394 U.S. 576 (1969).

<sup>5</sup> 415 U.S. 566 (1974).

<sup>6</sup> 418 U.S. 405 (1974).

<sup>7</sup> 491 U.S. 397 (1989).

<sup>8</sup> Tex. Penal Code Ann. § 42.09(a)(3) (1989).

<sup>9</sup> Tex. Penal Code Ann. § 42.09(b) (1989).

<sup>10</sup> 706 S.W. 2d 120 (1986).

violation of his First Amendment rights<sup>11</sup>.

The Supreme Court affirmed the Texas Court of Criminal Appeals ruling. The Court found that Johnson's conduct constituted symbolic expression which was both intentional and overtly apparent. The Court determined that, since Johnson's guilt depended on the communicative aspect of his expressive conduct and was restricted because of the content of the message he conveyed, the Texas statute was "content-based" and subject to "the most exacting scrutiny test" outlined in *Boos v. Barry*, 485 U.S. 312 (1988). Further, the Court stated that, although the Government has an interest in encouraging proper treatment of the flag, it may not criminally punish a person for burning a flag as a means of political protest.<sup>12</sup> The Court determined that the Texas statute was designed to prevent citizens from conveying "harmful" messages, reflecting a government interest that violated the First Amendment principle that government may not prohibit expression of an idea simply because it finds the idea itself offensive or disagreeable.<sup>13</sup>

In response to the *Johnson* ruling, Congress took steps to amend the 1968 statute to make

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<sup>11</sup> 755 S.W. 2d 92 (1988).

<sup>12</sup> The Court ruled that Texas' proffered interest of preventing breaches of the peace was not implicated and that its interest in preserving the flag as a symbol of nationhood and national unity was related to the suppression of expression.

<sup>13</sup> Certain uses of the flag are misdemeanors under 4 U.S.C. 3, punishable by a fine of not more than \$100 or imprisonment of not more than thirty days or both. Acts criminalized under existing federal law include: using the flag in "advertising of any nature," or any person who "shall manufacture, sell expose for sale, or to public view, or give away or use for an purpose, any article or substance being an article of merchandise or a receptacle for merchandise or article or thing for carrying or transporting merchandise, upon which shall have been printed, painted, attached or otherwise placed a presentation of any such flag, standard, colors, or ensign, to advertise, call attention to, decorate, mark, or distinguish the article or substance on which so placed...." Although not enforceable under current precedents, these restrictions would become fully enforceable against businesses, individuals and any member of Congress using the flag in a campaign ad, should the amendment be ratified. A formal representation of the exact flag is not required. The existing statute includes in the definition of "flag," "any picture or representation of either, or any part or parts of either, made fo any substance or represented on any substance, of any size evidently purporting to be either of said flag, standard, colors, or ensign of the United States of America or a picture or a representation of either, upon which shall be shown the colors, the stars and stripes, in any number of either thereof, or of any part or parts of either, by which the average person seeing the same without deliberation may believe the same to represent the flag ...."

it “content neutral” by passing the “Flag Protection Act of 1989.”<sup>14</sup> The Flag Protection Act of 1989 prohibited flag desecration under all circumstances by removing the statutory requirement that the conduct cast contempt upon the flag. The statute also defined the term “flag” in an effort to avoid any latent First Amendment vagueness problems.<sup>15</sup> Following passage of the Flag Protection Act, a wave of the flag burnings took place in over a dozen cities. The first Bush administration decided to test the Flag Protection Act by bringing criminal charges against protesters who participated in two incidents, one in Seattle and the other in Washington, D.C.<sup>16</sup> In both cases, the federal district courts relied on *Johnson*, striking down the 1989 law as unconstitutional when applied to political protesters.

The Supreme Court accepted jurisdiction of these cases (consolidated as *U.S. v. Eichman*, 496 U.S. 310 (1990)), and, in a 5-4 decision upheld the lower federal court rulings and struck down the Flag Protection Act of 1989.<sup>17</sup> Again, the Court ruled that the Government’s stated interest in protecting the status of the flag “as a symbol of our Nation and certain national ideals” was related to “the suppression of free expression” that gave rise to an infringement of First Amendment rights. The Court acknowledged that the 1989 law, unlike the Texas statute in *Johnson*, contained no content-based limitations on the scope of protected conduct. However, the Court determined, the federal statute was subject to strict scrutiny because it could not be enforced without reference to the message of the “speaker.”

Since the *Eichman* decision, Congress repeatedly considered and rejected a proposed Constitutional amendment specifying that “the Congress and the states have the power to prohibit the physical desecration of the flag of the United States.”

## **II. The Proposed Amendment Would Abridge Free Expression:**

Proponents of the amendment argue that desecration of the flag should not be considered speech within the meaning of First Amendment. Yet it is precisely the expressive content of acts involving the flag that the amendment would target. Indeed, it appears that proponents of the amendment sometimes wish to have it both ways. For example, an amendment offered by Rep. Scott replacing the word “desecration” with the word “burning” was rejected precisely because it

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<sup>14</sup> Pub. L. No. 101-131 (1989).

<sup>15</sup> The Flag Protection Act of 1989 defined “flag” as “any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed.” 18 U.S.C. 700.

<sup>16</sup> The Washington, D.C. protest occurred on the steps of the Capitol.

<sup>17</sup> *U.S. v. Eichman*, 496 U.S. 310 (1990) (consolidating No. 89-1433, *U.S. v. Eichman*, 731 F.Supp. 1123 (D.D.C., 1990), and *U.S. v. Haggerty*, 731 F.Supp. (W.D. WA., 1990)).

would have prohibited the destruction of a flag in a purely content neutral manner<sup>18</sup>. As Chairman Chabot observed, “A debate and discussion as to what forms of desecration should be outlawed, such as ‘burning’ will come at a later date in Congress. Therefore, this amendment should be rejected as unduly limiting the object and purpose of the Flag Protection Amendment, which is to protect the flag from any acts of physical defilement or defacement, or as is described in this, desecration.”<sup>19</sup>

That the criminal sanctions against flag burning in the *Johnson* case, and the ones the sponsors of this amendment would presumably seek to enact upon its adoption, are directly related to the expressive content of the act are clear. Current law prescribes that “[t]he flag, when it is in such condition that it is no longer a fitting emblem for display, should be destroyed in a dignified way, preferably by burning.”<sup>20</sup> It is clear then, that prohibitions against flag burning or “physical desecration” are fundamentally content-based. Burning a flag to demonstrate respect or patriotism is prescribed by current law. Should the proposed amendment pass, burning the flag to convey a political viewpoint of dissent or anger at the United States would become a crime.

The Framers of the Constitution saw dissent and its protection as an affirmative social good.<sup>21</sup> Limits on the manner or form of dissent must inevitably translate into limits on the content of the dissent itself. Limitations on the use of the flag in political demonstrations ultimately undermines the freedoms the flag represents.

There can be no doubt that ‘symbolic speech’ relating to the flag falls squarely within the ambit of traditionally protected speech. Our nation was borne in the dramatic symbolic speech of the Boston Tea Party, and our courts have long recognized that expressive speech associated with the flag is protected speech under the First Amendment.

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<sup>18</sup> The term ‘desecration’ itself is highly revealing. Webster’s New World Dictionary defines ‘desecrate’ as ‘to violate the sacredness of,’ and in turn defines ‘sacred’ as ‘consecrated to a god or God; holy; or having to do with religion.’ Proponents of the amendment use similar language in defending the proposal.

<sup>19</sup> H.Rpt. 107-\_\_\_\_, at \_\_\_\_ (2003)(statement of Rep. Chabot).

<sup>20</sup> 4 U.S.C. 8(k).

<sup>21</sup> “[T]hose who are resentful because their interests are not accorded fair weight, and who may be doubly resentful because they have not even had a chance to present those interests, may seek to attain by radical changes in existing institutions what they have failed to get from the institutions themselves. Thus liberty of expression, though often productive of divisiveness, may contribute to social stability.” Kent Greenwalt, *Speech and Crime*, Am. B. Found. Res. J. 645, 672-3 (1980).

Beginning in 1931 with *Stromberg v. California*<sup>22</sup> and continuing through the mid-1970's with *Smith v. Goguen*<sup>23</sup> and *Spence v. Washington*,<sup>24</sup> the Supreme Court has consistently recognized that flag-related expression is entitled to constitutional protection. Indeed, by the time Gregory Johnson was prosecuted for burning a U.S. flag outside of the Republican Convention in Dallas, the State of Texas readily acknowledged that Johnson's conduct constituted 'symbolic speech' subject to protection under the First Amendment.<sup>25</sup> Those who seek to justify H.J. Res. 4 on the grounds that flag desecration does not constitute 'speech' are therefore denying decades of well understood law.<sup>26</sup>

While we deplore the burning of an American flag in hatred, we recognize that it is our allowance of this conduct that reinforces the strength of the Constitution. As one Federal court wrote in a 1974 flag burning case, "[T]he flag and that which it symbolizes is dear to us, but not so cherished as those high moral, legal, and ethical precepts which our Constitution teaches."<sup>27</sup> The genius of the Constitution lies in its indifference to a particular individual's cause. The fact that flag burners are able to take refuge in the First Amendment means that every citizen can be assured that the Bill of Rights will be available to protect his or her rights and liberties should the need arise.

H.J. Res. 4 will also open the door to selective prosecution based purely on political

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<sup>22</sup>283 U.S. 359 (1931) (State statute prohibiting the display of a 'red flag' overturned). Absent this decision, a State could theoretically have prevented its citizens from displaying the U.S. flag.

<sup>23</sup>415 U.S. 94 (1972).

<sup>24</sup>418 U.S. 405 (1974) (overturning convictions involving wearing a flag patch and attaching a peace sign to a flag).

<sup>25</sup>*Texas v. Johnson*, 491 U.S. at 397.

<sup>26</sup>See also, Note, *The Supreme Court--Leading Cases*, 103 Harv. L. Rev. 137, 152 (1989) ('the majority opinion [in Johnson] is a relatively straightforward application of traditional first amendment jurisprudence'); Sheldon H. Nahmod, *The Sacred Flag and the First Amendment*, 66 Ind. L.J. 511, 547 (1991) ('*Johnson* is an easy case if well-established first amendment principles are applied to it'). Survey results show that the majority of Americans who initially indicate support for a flag protection amendment oppose it once they understand its impact on the Bill of Rights. In a 1995 Peter Hart poll, 64 percent of registered voters surveyed said they were in favor of such an amendment, but when asked if they would oppose or favor such an amendment if they knew it would be the first in our Nation's history to restrict freedom of speech and freedom of political protest, support plummeted from 64 percent to 38 percent.

<sup>27</sup>*U.S. ex rel Radich v. Criminal Court of N.Y.*, 385 F. Supp. 165, 184 (1974).

beliefs. When John Peter Zenger was charged with 'seditious libel' in the very first case involving freedom of speech on American soil, his lawyer, James Alexander warned:

The abuses of freedom of speech are the excrescences of Liberty.  
They ought to be suppressed; but whom dare we commit the care  
of doing it? An evil Magistrate, entrusted with power to punish  
Words, is armed with a Weapon the most destructive and terrible.  
Under the pretense of pruning the exuberant branches, he frequently  
destroys the tree.<sup>28</sup>

The history of the prosecution of flag desecration in this country bears out these very warnings. The overwhelming majority of flag desecration cases have been brought against political dissenters, while commercial and other forms of flag desecration have been almost completely ignored. An article in *Art in America* points out that during the Vietnam War period, those arrested for flag desecration were "invariably critics of national policy, while 'patriots' who tamper with the flag are overlooked."<sup>29</sup> Whitney Smith, director of the Flag Research Center has further observed that commercial misuse of the flag was "more extensive than its misuse by leftists or students, but this is overlooked because the business interests are part of the establishment."<sup>30</sup>

Almost as significant as the damage H.J. Res. 4 would do to our own Constitution, is the harm it will inflict on our international standing in the area of human rights. Demonstrators who cut the communist symbols from the center of the East German and Romanian flags prior to the fall of the Iron Curtain committed crimes against their country's laws, yet freedom-loving.

Americans justifiably applauded these brave actions. If we are to maintain our moral stature in matters of human rights, it is essential that we remain fully open to unpopular dissent, regardless of the form it takes.<sup>31</sup>

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<sup>28</sup>PHILADELPHIA GAZETTE, Nov. 17, 1737, quoted in Levy, *Legacy of Suppression* 135 (1960).

<sup>29</sup>See Robert J. Goldstein, *Two Centuries of Flagburning in the United States*, 163 Flag Bull. 65, 154 (1995).

<sup>30</sup>*Id.*

<sup>31</sup>See, See *Hearing on H.J. Res. 54, Proposing an Amendment to the Constitution of the United States Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong., 2nd Sess. (April 30, 1997) [hereinafter *1997 House Judiciary Hearings*] (statement of PEN American Center, Feb. 5, 1997) ('To allow for the prosecution of [flag burners] would be to dilute what has hitherto been prized by Americans everywhere as a cornerstone of our democracy. The right to free speech enjoys more protection in our country than perhaps any other country in the world.').

To illustrate, when the former Soviet Union adopted legislation in 1989 making it a criminal offense to 'discredit' a public official, Communist officials sought to defend the legislation by relying on, among other things, the United States Flag desecration statute.<sup>32</sup> By adopting H.J. Res 4 we will be unwittingly encouraging other countries to enact and enforce other more restrictive limitations on speech while impairing our own standing to protest such actions.

### **III. Amending the Constitution to Limit the Bill of Rights Sets a Dangerous Precedent:**

Adoption of H.J. Res. 4 will also create a number of dangerous precedents in our legal system. The Resolution will encourage further departures from the First Amendment and diminish respect for our Constitution. Doing so would make it unlikely to be that this would be the last time Congress acts to restrict our First Amendment liberties. As President Reagan's Solicitor General Charles Fried testified in 1990:

Principles are not things you can safely violate 'just this once.' Can we not just this once do an injustice, just this once betray the spirit of liberty, just this once break faith with the traditions of free expression that have been the glory of this nation? Not safely; not without endangering our immortal soul as a nation. The man who says you can make an exception to a principle, does not know what a principle is; just as the man who says that only this once let's make  $2+2=5$  does not know what it is to count.<sup>33</sup>

Amending the Constitution, particularly concerning issues which inflame public passion, represents a clear and present danger to our core liberties.<sup>34</sup> Conservative legal scholar Bruce Fein emphasized this concern when he testified before the Subcommittee at 1995 House Judiciary hearings:

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<sup>32</sup>Rotunda, *Treatise on Constitutional Law: Substance and Procedure* § 20.49 at 352 (2d ed. 1992).

<sup>33</sup>*Measures to Protect the American Flag, 1990: Hearing Before the Senate Comm. on the Judiciary*, 101st Cong. (June 21, 1990) (statement of Charles Fried at 113).

<sup>34</sup>Legal philosopher Lon Fuller also highlighted this very problem over four decades ago: 'We should resist the temptation to clutter up [the Constitution with amendments relating to substantive matters. In that way we avoid] . . . the obvious unwisdom of trying to solve tomorrow's problems today. But [we also escape the] more insidious danger of the weakening effect [such amendments] have on the moral force of the Constitution itself.' L. Fuller, *American Legal Philosophy at Mid-Century*, 6 J.L. Ed. 457, 465 (1954), as cited in *Proposed Flag Desecration Amendment 1995: Hearing Before the Subcomm. on Constitution of the Senate Comm. on the Judiciary*, 104th Cong. (June 6, 1995) [hereinafter, 1995 *Senate Judiciary Hearings*] (statement of Gene R. Nichol).



While I believe the *Johnson* and *Eichman* decisions were misguided, I do not believe a Constitutional amendment would be a proper response. . . . To enshrine authority to punish flag desecrations in the Constitution would not only tend to trivialize the Nation's Charter, but encourage such juvenile temper tantrums in the hopes of receiving free speech martyrdom by an easily beguiled media. . . . It will lose that reverence and accessibility to the ordinary citizen if it becomes cluttered with amendments overturning every wrong-headed Supreme Court decision.<sup>35</sup>

Professor Norman Dorsen points out in his testimony, 'not including the Bill of Rights, which was ratified in 1791 as part of the original pact leading to the Constitution, only 17 amendments have been added to it, and very few of these reversed constitutional decisions of the Supreme Court. To depart from this tradition now . . . would be an extraordinary act that could lead to unpredictable mischief in coming years.'<sup>36</sup>

#### **IV. Flag Burning Rarely Occurs:**

H.J. Res. 4 responds to a perceived problem--flag burning--that is all but nonexistent in American life today. Studies indicate that in all of American history from the adoption of the United States flag in 1777 through the *Texas v. Johnson*<sup>37</sup> decision in 1989 there were only 45 reported incidents of flag burning.<sup>38</sup> Experience with prior efforts to criminalize flag desecration

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<sup>35</sup>See *Proposing an amendment to the Constitution of the United States authorizing the Congress and the States to prohibit the physical desecration of the flag of the United States, 1995: Hearing on H.J. Res. 79, Before the Subcomm. on Constitution of the House Comm. on the Judiciary*, 104th Cong.(1995) [hereinafter, *1995 House Judiciary Hearings*] (statement of Bruce Fein, at 1).

<sup>36</sup>See *1997 House Judiciary Hearings*, *supra* n. 31 (statement of Professor Norman Dorsen, New York University School of Law).

<sup>37</sup>491 U.S. 397 (1989). In a 5-4 decision authored by Justice Brennan, the Court found that the Texas flag desecration law was unconstitutional as applied in that it was a 'content-based' restriction. Subsequent to *Johnson*, Congress enacted the Flag Protection Act in an effort to craft a more content-neutral law. In *United States v. Eichman*, 496 U.S. 310 (1990), the Court overturned several flag burning convictions brought under the new law, finding that the Federal law continued to be principally aimed at limiting symbolic speech.

<sup>38</sup>Robert J. Goldstein, *Two Centuries of Flagburning in the United States*, 163 *Flag Bull.* 65 (1995).

indicates that imposing such penalties have actually instigated flag burning.<sup>39</sup>

In addition to the relative infrequency of flag burning, proponents of the measure cast the current state of the law as though Congress is impotent to protect the flag. However, even witnesses who disagree with the Supreme Court rulings in *Johnson* and *Eichman* have stated that the impact of those cases was not so broad. In 1995, Bruce Fein stated as much in subcommittee hearings. "Flag desecrations when employed as 'fighting words' or when intended and likely to incite a violation of law remain criminally punishable under the Supreme Court precedents in *Chaplinsky v. New Hampshire* and *Brandenburg v. Ohio*."<sup>40</sup>

## **V. This Amendment is the Wrong Way to Honor Our Veterans:**

It is a mistake to argue that this amendment honors the courage and sacrifice of our veterans. While we condemn those who would dishonor our nation's flag, we believe that rather than protecting the flag, H.J. Res. 4 will merely serve to dishonor the Constitution and to betray the very ideals for which so many veterans fought, and for which so many members of our armed forces made the ultimate sacrifice. General Colin L. Powell echoed this sentiment:

The First Amendment exists to insure that freedom of speech and expression applies not just to that with which we agree or disagree, but also that which we find outrageous. I would not amend that great shield of democracy to hammer a few miscreants. The flag will be flying proudly long after they have slunk away.<sup>41</sup>

Jim Warner, a Vietnam veteran and prisoner of the North Vietnamese from October 1967 to March 1973, has written:

The fact is, the principles for which we fought, for which our comrades died, are advancing everywhere upon the Earth, while the principles against which we fought are everywhere discredited and rejected. The flag burners have lost, and their defeat is the most fitting and thorough rebuke of their principles which the human could devise. Why do we need to do more? An act intended merely as an

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<sup>39</sup> In his extensive survey of the history of American flag desecration law, Robert Goldstein writes that "[a]lthough the purpose of the [Flag Protection Act adopted by Congress in 1968] was to supposedly end flag burnings, its immediate impact was to spur perhaps the largest single wave of such incidents in American history." Robert J. Goldstein, *Saving 'Old Glory': The History of the American Flag Desecration Controversy* 215 (1995).

<sup>40</sup> 1995 *House Judiciary Hearings*, *supra* n. 35 (statement of Bruce Fein at 1-2).

<sup>41</sup> Letter from General Colin L. Powell to Hon. Patrick Leahy, May 18, 1999.

insult is not worthy of our fallen comrades. It is the sort of thing our enemies did to us, but we are not them, and we must conform to a different standard. . . . Now, when the justice of our principles is everywhere vindicated, the cause of human liberty demands that this amendment be rejected. Rejecting this amendment would not mean that we agree with those who burned our flag, or even that they have been forgiven. It would, instead, tell the world that freedom of expression means freedom, even for those expressions we find repugnant.<sup>42</sup>

There are many ways Congress can honor veterans. First and foremost, we can insure that programs designed to protect them and provide them with much needed assistance are properly funded. Yet the conference agreement on the 2004 Budget Resolution, recently adopted, short-changes our veterans in vital areas such as health care.

The conference agreement increases funding for appropriated veterans programs for 2004 by \$2.6 billion above the amount needed to maintain purchasing power at the 2003 level, but cuts appropriations for veterans health care by a total of \$6.2 billion below that level over ten years. The conference agreement does not include the reconciliation instructions to reduce spending for mandatory veterans benefits by \$14.6 billion over ten years that were contained in the House Republican budget. The House rejected these cuts in the motion to instruct conferees offered by Rep. Spratt, which was adopted by a vote of 399-22 on April 1, 2003. Ultimately, the conference agreement provides \$22.1 billion more in budget authority for veterans programs than the House Republican budget.

The ten-year cut to appropriated veterans programs is likely to be even worse than it appears, and the apparent \$2.6 billion increase for veterans programs for 2004 is likely to be smaller than it at first appears, because the Republican conference agreement includes an additional ten-year unspecified cut of \$128 billion, with \$7.6 billion in additional unspecified cuts for 2004 alone. The Appropriations Committee may apply some or all of this additional cut to discretionary veterans programs.

The conference agreement assumes the implementation of proposals included in the President's budget to impose a \$250 enrollment fee on priority level 7 and 8 veterans who wish to maintain their eligibility to use the veterans medical care system, and to increase co-payments for primary care visits and prescription drugs for priority level 7 and 8 veterans.

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<sup>42</sup>See *1997 House Judiciary Hearings, supra*. n 31 (statement of Jim Warner). These thoughts are echoed by Terry Anderson, a former U.S. Marine Staff Sergeant and Vietnam veteran who was held hostage in Lebanon, who wrote that '[H.J. Res. 54] is an extremely unwise restriction of every American's Constitutional rights. The Supreme Court has repeatedly held that the First Amendment protects symbolic acts under its guarantee of free speech. Burning or otherwise damaging a flag is offensive to many (including me), but it harms no one and is so obviously an act of political speech that I'm amazed anyone could disagree with the Court.' (*Id.* statement of Terry Anderson).

## **VI. Conclusion:**

Adoption of H.J. Res. 4 will undermine our commitment to freedom of expression and do real damage to the constitutional system set up by our forefathers. If we amend the Constitution to outlaw flag desecration, we will be joining ranks with countries such as China and Iran and the regimes of the former Soviet Union and South Africa.<sup>43</sup>

We believe we have come too far as a nation to risk jeopardizing our commitment to freedom in such a fruitless endeavor to legislate patriotism. As the Court wrote in *West Virginia State Board of Education v. Barnette*:

[The] ultimate futility of . . . attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition as a means to religious and dynastic unity, the Siberian exiles as a means of Russian unity, down to the last failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.<sup>44</sup>

If we adopt H.J. Res. 4, we will be denigrating the vision of Madison and Jefferson. If we tamper with our Constitution, we will have turned the flag, an emblem of unity and freedom, into a symbol of intolerance. We will not go on record as supporting a proposal which will do what no foreign power and no flag burner has been able to do--limit the freedom of expression of the American people.

John Conyers, Jr.  
Howard L. Berman  
Rick Boucher  
Jerrold Nadler  
Robert C. Scott  
Melvin L. Watt  
Zoe Lofgren  
Sheila Jackson Lee  
Maxine Waters

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<sup>43</sup>Roman Rolinick, 'Flag Amendment would put U.S. with Iran, China,' UPI (July 1, 1989).

<sup>44</sup>319 U.S. at 641.

Tammy Baldwin  
Linda T. Sanchez